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# United Nations Commission on International Trade Law

**Forty-third session**

**Summary record of the 903rd meeting**

Held at Headquarters, New York, on 22 June 2010, at 10 a.m.

*Chairperson:* Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

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*The meeting was called to order at 10.20 a.m.*

**Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules** (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add. 1-10)

*Draft revised UNCITRAL Arbitration Rules*

*Section II. Composition of the arbitral tribunal* (*continued*)

*Draft article 16. Exclusion of liability* (*continued*)

1. **The Chairperson**, recalling the observations made following informal discussions, said that some delegates had noted that the term "intentional wrongdoing" was used in some national laws but not in others, and that it was expressed in different forms in different legal orders. Others, however, had felt that intentional wrongdoing was at the core of all liability claims for wrongful acts and that judges everywhere would understand the concept, regardless of the term used to capture it in their national laws. In response to the view that the draft article could create a liability claim where none existed, some delegates had pointed out that, by saying that "the parties waive ... any claim against the arbitrators", the draft article was, in fact, saying that there was a claim that could be waived.

2. Lastly, some delegates had noted that, in some legal systems, there were situations where the applicable law went further than "intentional wrongdoing" and where liability could not be waived. Others had said that those situations were covered by the expression "to the fullest extent permitted under the applicable law".

3. **Mr. Snijders** (Observer for the Netherlands) said that there were only slight differences in the terminology used to express the idea of intentional wrongdoing around the world and that those differences had no impact on the application of the concept. His delegation therefore supported the draft article as presented.

4. **Ms. Aguirre** (Argentina), speaking in support of the draft article, said that it had been discussed at length in the Working Group and that the text submitted was the result of a consensus reached among the members.

5. **The Chairperson** said that even if the Working Group had reached a consensus, the Committee of the Whole should not be limited in its examination of the draft articles, especially if it felt that something deserved to be reconsidered.

6. **Ms. Matias** (Israel) said that she supported the text as presented, subject to the general agreement that the reference to the Secretary-General of the PCA would be deleted.

7. **Mr. Bellenger** (France) said that the report should show that some delegations, including his own, were somewhat uneasy with the draft article, not only because of its substance, but also because it was not in line with practice. In addition, it was an illusion to think that national judges would be bound by that provision on the settlement of arbitral disputes. The draft article would create a situation where people thought they were protected by the Rules of Arbitration when in fact they were not.

8. **The Chairperson** said that all delegates were aware that protection was not absolute, which was why the text set out the condition of "intentional wrongdoing".

9. *Draft article 16, as amended, was adopted.*

*Draft article 2. Notice and calculation of periods of time* (*continued*)

10. **The Chairperson** drew attention to document A/CN.9/704/Add.8, which contained a revised version of draft article 2.

11. **Ms. Matias** (Israel) said that her delegation supported the proposal made by the delegation of the United States of America in document A/CN.9/704/Add.1 to retain the version of draft article 2 found in A/CN.9/WG.II/WP.157.

12. **The Chairperson** recalled that one of the points which had been raised about the draft article was the requirement, upon the delivery of a communication, of a record of the "information contained therein", as stated in paragraph 3. It had been argued that, in many forms of transmission of communications, there was no record of the information contained therein. With courier services, for example, a signature of the addressee confirming that a package had been delivered was sufficient. As the expression "information contained therein" had been introduced only in the context of electronic communication, a proposal had been made to delete those words, in order to have a rule that applied to all forms of transmission.

13. **Ms. Cordero Moss** (Norway) and **Ms. Matias** (Israel) supported the proposal.

14. **Mr. Chung** Chang-ho (Republic of Korea), while expressing support for the proposal, said that he would prefer to revert to the language of paragraph 1 of working paper A/CN.9/WG.II/WP.157, which read as follows: "Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provides a record of its transmission". That paragraph had been chosen originally because it covered every possible means of transmission.

15. **The Chairperson** said that that paragraph had been recast in draft article 2, paragraph 3, but he took it that the Committee had agreed to delete the words "the information contained therein".

16. *It was so decided.*

17. **The Chairperson**, turning to the rest of the paragraph and the record of "sending and receipt", wondered whether the concerns raised earlier could be resolved by replacing that expression with "the record of transmission".

18. **Mr. Chung** Chang-ho (Republic of Korea) said that he agreed with the suggestion, but that the text of paragraph 1 proposed in working paper A/CN.9/WG.II/WP.157 (para. 8) should become the first paragraph of draft article 2 because, unlike paragraph 3, which referred only to notices under paragraphs 1 (b) and 2, that text would set out the general principle of methods of communication.

19. **The Chairperson** wondered whether, in paragraph 3, changing the wording from "sending and receipt" to "transmission" would cover receipt of a notice or not.

20. **Mr. Chung** Chang-ho (Republic of Korea) said that transmission covered only sending, because receipt must be proven by the receiving party. However, evidence of receipt was not necessary. The only reference should be to methods of transmission, including electronic transmission.

21. **Ms. Matias** (Israel) said that she fully supported the proposal to include a reference to means of communication in paragraph 1.

22. **The Chairperson** said that apart from the specific reference in paragraph 3 to paragraphs 1 (b) and 2 and "information continued therein", the only difference between the present paragraph 3 and the previous paragraph 1 was the use, in the latter, of the word "transmission" instead of "sending and receipt". Delegations should therefore decide whether to use the expression "record of sending and receipt", or "record of sending" only, or "record of transmission". They should also decide whether the chosen expression should be included in a new paragraph 1 or retained in paragraph 3.

23. **Mr. Castello** (United States of America) said that paragraph 3 should be deleted altogether and replaced with paragraph 1 from the working paper (A/CN.9/WG.II/WP.157). If the Rules required a record of receipt as proposed in draft article 3, they would become more complicated, because there were circumstances where it would be impossible to obtain a record of receipt. The only change his delegation might suggest to the proposed paragraph 1 would be to replace the word "delivered" with "sent", because that paragraph referred to permissible modes of transmitting documents to the other parties or to the tribunal.

24. **The Chairperson** said that he did not see how replacing the present paragraph 3 with the proposed paragraph 1 would change anything, because what was required was not a record of receipt, but simply a record of sending. If "delivered" were replaced by "sent", the problem of physical delivery would not be resolved, because there was no need for a record of sending when something was delivered in person.

25. **Mr. Castello** (United States of America) said that the proposed paragraph 1 should be placed at the top of draft article 2 because it referred generally to all means of communication. With regard to physical delivery, the sending party would usually want to have a record of compliance with the required mode of delivery, whether it was by way of a form or by any other means which would qualify as a record of transmission.

26. **The Chairperson** said that he had thought that if something was delivered physically then it could not be considered to have been sent.

27. **Mr. Ghikas** (Canada) said that "deemed receipt" was contemplated in certain circumstances and that mere sending in those circumstances would constitute evidence of receipt.

28. **Mr. Seweha** (Egypt) said that draft article 2 should be comprehensive and inclusive of all practical

cases. It was his understanding that paragraph 1 (a) referred to situations where the addressee was present at the designated place of delivery and received the notification. Paragraph 1 (b), on the other hand, referred to situations where the addressee was not present at the address, such that the communication was delivered at the habitual residence or place of business, or was sent to the last-known address.

29. The stipulation in paragraph 1 (b) that the notice would be deemed to have been received if it was delivered at the habitual address was difficult to understand. It was unclear whether if someone living with the addressee received the notice or if the notice was left at the door, it would be deemed to have been delivered. Consequently, his delegation proposed that a new paragraph should be added to cover cases where the addressee was present and refused to take delivery of the notice.

30. **The Chairperson** said that refusal to take delivery was covered by paragraph 2, which said that if delivery failed, the notice was deemed to have been received if it was sent to the addressee's last-known place of business or address.

31. **Mr. Seweha** (Egypt) said that as deemed receipt would apply only if the notice was sent to the addressee's last-known address or place of business, it meant that delivery failed because the addressee's current address was unknown. If the paragraph had intended to convey refusal of receipt, then there would have been no need to refer to the last-known place of business or address. Therefore, neither paragraph 1 (a) nor paragraph 2 covered the situation where a person or his or her representative was present but refused to take delivery of the notice.

32. **The Chairperson** suggested that if the word "receipt" was replaced by "sent", then that problem might not arise, and if receipt was no longer required, then the issue of deciding who should take delivery of a notice would be moot.

33. **Mr. Chung** Chang-ho (Republic of Korea) said that the word "delivered" in the previous paragraph 1 should be retained instead of "sent", because delivery was the principal method of communication, while sending was a concept of communication which applied only when the addressee could not be found.

34. **The Chairperson** said he took it that the proposal was that the word "sending" could be used in the current paragraph 2 when the only option was to send the notice to the last-known address. He wished to know what would happen under the current Rules if the word "delivered" was retained and the addressee refused to take delivery of the notice.

35. **Mr. Chung** Chang-ho (Republic of Korea) said that if the addressee refused to take delivery, the person delivering the notice would leave it at the house and make a record that the notice had been delivered to the address.

36. **The Chairperson** suggested that, for the sake of clarity, draft article 2 might have to be revisited at a later stage.

37. **Mr. Petrochilos** (Greece), speaking on behalf of his own delegation and the Chairperson, introduced a new proposal for a revised version of draft article 2, which read as follows:

> "1. For the purposes of these Rules, any notice, including a notification, communication or proposal, may be delivered:
>
> (a) physically to the addressee; or
>
> (b) at the habitual residence or place of business of the addressee, or at any other address previously designated by the addressee for this purpose; or
>
> (c) at the addressee's last-known place of business or address, if after reasonable efforts delivery cannot be effected in accordance with paragraph (a) or (b).
>
> 2. Delivery shall be effected by any means of communication that provides a record of sending and receipt.
>
> 3. Notice shall be deemed to have been received on the day it is delivered under paragraph 1.
>
> 4. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business

days occurring during the running of the period of time are included in calculating the period."

38. **Mr. Jacquet** (France), welcoming the proposal introduced by the representative of Greece, said that delivery and receipt were not as important as they appeared. The rules on notifications indicated by what means a communication could validly be made by one party to another, and their purpose was to avoid the need for comprehensive proof of delivery of the notification to the other party and proof of that party's knowledge of the notification. He proposed that the word "delivery" in paragraph 1 (c) of the text proposed by the Greek delegation should be replaced with the word "notification" because the subparagraph in question referred to circumstances in which it had not been possible to effect notification under subparagraphs (a) and (b). It was not logical to introduce a requirement of delivery in subparagraph (c) when no such requirement was mentioned in subparagraphs (a) and (b).

39. With regard to the comments made by the representative of Egypt, there was no need to provide for the possibility of a party's refusal to receive notification. Once a notification had been sent under paragraph 1, refusal of receipt was irrelevant, and providing for such refusal would negate the impact of the modes of notification set out in paragraph 1.

40. **The Chairperson** said that there seemed to be general agreement that the words "transmission" or "sending" should be used instead of "receipt". He asked whether the term "transmission" was preferred to the word "sending".

41. **Ms. Matias** (Israel) said that her delegation had favoured the concept of a record of receipt, but, in view of the concerns raised by other delegations, would not insist on it. Her delegation preferred the word "transmission" to the word "sending". She agreed with the representative of the Republic of Korea that the word "delivered" should not be replaced with the word "sent" in the version of draft article 2, paragraph 1 (b), contained in document A/CN.9/703, since the provision in general dealt with time frames based on the date of delivery.

42. **Mr. Boulet** (Observer for Belgium) said he agreed that the concept of sending should be regarded as an exception; the general principle behind the draft article was that of delivery. It would be preferable to refer to a record either of sending or of delivery; the use of the word "transmission" would create unnecessary ambiguity.

43. At the same time, his delegation would prefer to retain the reference to a means of communication that provided a record of receipt, since the sender had the burden of proof in the event of a dispute as to whether or not the notice had been received. However, if there was a consensus in favour of referring only to a record of sending, his delegation would go along with it, particularly since, if a dispute arose, draft article 27 in any case provided that each party had the burden of proving the facts relied on to support its claim or defence. Therefore, if the sender wanted to guard against the possibility of a dispute, it could choose a means of communication that provided a record of receipt. Moreover, in most cases no dispute would arise anyway.

44. **Ms. Peer** (Austria) said that, while her delegation understood the concerns that had been raised about requiring a record of receipt, it would prefer not to remove the requirement completely. Records of receipt were particularly important with regard to notices of arbitration, since only such a record would provide certainty that a party had knowledge of the arbitration proceedings. However, her delegation could accept a text that referred only to a record of transmission.

45. **Mr. Petrochilos** (Greece) said that the 1976 Arbitration Rules treated delivery and receipt as two sides of the same coin; if physical delivery was effected, then the notice was deemed to have been received. Like most laws on the subject, the Rules approached the question of delivery from the perspective of the sender and placed a burden on the sender to effect delivery.

46. The Rules did not deal with situations in which the address was not the correct address or in which a given representative of the recipient was not a proper representative; nor did they need to deal with such situations because, if a party claimed not to have received proper notice of arbitration proceedings, the matter could be resolved by the arbitral tribunal or the courts. Similarly, the matter of refusal by a party to take delivery of a notice was not explicitly addressed in the Rules; however, if the sender, through an intermediary, effected delivery and the person physically making the delivery recorded that it was refused, the delivery was nonetheless considered effected. Disputes as to whether or not proper notice

had been received in such circumstances were again a matter for the tribunal or the courts. The scope of the Rules was therefore limited in those respects; they focused on the practical concepts of delivery and transmission by proper means to the right addressee at the right address, which led to a presumption of receipt and of the time of that receipt. The revised version of draft article 2 proposed by his delegation and the Chairperson aimed to reflect those concepts.

47. **Mr. Chan** (Singapore) said that one of the purposes of revising the Arbitration Rules was to bring them into line with the Commission's work in other areas, in particular the area of electronic communications. He therefore proposed that the word "delivery" should be replaced by the word "dispatch", in line with the United Nations Convention on the Use of Electronic Communications in International Contracts.

48. **Mr. Seweha** (Egypt) said he agreed with the representative of Belgium that the sender, as the initiator of delivery, should bear the burden of proof of receipt. Since the Arbitration Rules did not place such a burden on the sender, they should make it clear that, if the sender did not obtain proof of receipt, it incurred the risk of the addressee's denying receipt. The Egyptian courts had operated in line with the approach set out in the 1976 Rules until 2005, when they had introduced a requirement for senders to obtain proof of receipt. That might lead to difficulties in the enforcement of decisions of arbitral tribunals in Egypt.

49. **Mr. Ghikas** (Canada) noted that draft article 3 stated that the parties must "give" notice of arbitration, whereas draft article 4 contained the word "communicate". That terminology should be reviewed in the light of the eventual decision on the wording of draft article 2.

50. **The Chairperson** noted that, in addition, draft article 3, paragraph 2, contained the word "received", which might need to be reviewed, once draft article 2 had been finalized, for cases where no physical delivery was effected.

*The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.*

51. **The Chairperson** said that the consideration of draft article 2 would be resumed at a later stage pending further consultations.

*Section IV. The award*

*Draft article 34. Form and effect of the award*

52. **Mr. Castello** (United States of America) said that, bearing in mind the extended debate that had taken place in the Working Group and the Group's difficulties in reaching agreement on an exception to the waiver provided for in draft article 34, paragraph 2, the easiest solution was not to try to craft such an exception but rather to rely on the understanding reflected in many other rules that the waiver referred only to the right under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to resist enforcement or to apply for the setting aside of an award. His delegation therefore favoured deleting all the words contained in square brackets in the current text, except for the word "or" that appeared before the word "review". The word "against" should also be changed to "of".

53. **Mr. Moollan** (Mauritius) expressed agreement with the United States proposal. The rule would then be consistent with many other institutional rules and would also deal with a number of issues that had arisen under the 1976 Arbitration Rules.

54. **Mr. Ghikas** (Canada) said that his delegation favoured retaining only the first two sentences of the paragraph and deleting the remainder, so that the rule would remain almost identical to the 1976 version. Arbitral awards should be final, and possibilities for "second-guessing" them should be limited, as under the UNCITRAL Model Law on International Commercial Arbitration. The waiving of rights at law that would otherwise exist at the seat of arbitration should be done in a considered way and should not become a matter of course under the Rules. When drafting arbitration agreements, commercial parties usually gave considerable thought to the question of where the arbitration was to be seated, and one factor in their decision was the rights of appeal or review in the jurisdictions in question. The provision as currently drafted might not be interpreted in the same way in different jurisdictions. Moreover, as illustrated by two court decisions in Canada, it could not be assumed that such rights as the right to set aside an arbitration award under the Model Law would be preserved. However, if there was a consensus in favour of retaining the third sentence of the paragraph, then the second half of the

sentence, from the word "except" onwards, should be retained in some form.

55. **Ms. Hu** Shengtao (China), expressing support for the comments made by the representative of Canada, said that, whether or not the phrase in the last set of square brackets was kept, wording along the lines of "unless the laws of the country where the arbitration takes place stipulate otherwise" should be added at the beginning of the last sentence of the paragraph.

56. **Mr. Möller** (Observer for Finland) said that he supported the proposal made by the United States representative for the reasons set out by him. The 1976 version of the rule had not caused any difficulties to date. There was no need to add language along the lines of "insofar as such waiver can validly be made", because if the applicable law did not allow for a waiver, then the rule itself would not apply anyway.

57. **Mr. Torterola** (Argentina) said that, as pointed out by the representative of Canada, arbitral awards were final and binding on the parties. The rights set out in the New York Convention should not be undermined. The paragraph as currently drafted would be acceptable only if all the text in square brackets was retained. Otherwise the third sentence should be deleted entirely, as proposed by the representative of Canada.

58. **Ms. Smyth** (Australia), expressing support for the United States proposal, said that the concerns raised by the delegation of Canada and others were dealt with to some extent by the words "insofar as they may validly do so by adopting these Rules", which preserved the fundamental rights of recourse under the New York Convention. The third sentence of the paragraph was a useful addition because it minimized the possibility of other types of challenges to the merits of the award, which was consistent with the fundamental principle that awards were final and binding and should be carried out without delay. However, the text in square brackets in the second half of the sentence, in distinguishing between applications requesting the setting aside of an award and proceedings regarding execution and enforcement, highlighted the difficulties that had been faced in crafting an appropriate wording. For that reason, her delegation supported the United States proposal that the bracketed text should be deleted; however, if it was retained, it should be kept in its entirety. Her delegation saw no contradiction between allowing parties to challenge execution and enforcement and the fundamental principle that awards should be carried out without delay.

59. **Ms. Montejo** (Office of Legal Affairs) said that the Organization conducted its arbitrations outside of the procedural laws of the place of arbitration, in line with the 1946 Convention on the Privileges and Immunities of the United Nations. Therefore the bracketed text at the end of the last sentence of paragraph 2 might be interpreted in some instances as a waiver of the Organization's privileges and immunities. If that text was eventually adopted, a note would need to be added indicating that it did not signify such a waiver.

60. **The Chairperson** said that, as the Organization was not subject to the arbitration law at the seat of arbitration, it had no right of appeal under that law. There was therefore no need to provide for a waiver of that right.

61. **Ms. Montejo** (Office of Legal Affairs) said that the opposing parties might have different rights.

62. **Mr. Viswanathan** (India) concurred with the representative of Canada that if the words in square brackets were retained, then the entirety of the text should be retained. Under Indian law, once an award was granted by the arbitrators, the right of parties to challenge the award in court on any grounds permitted by the arbitration law could not be waived. Any agreement between the parties waiving recourse to a court was null and void under the Indian Contract Act.

63. **Mr. Montecino Giralt** (El Salvador) expressed his support for the position taken by the representative of Argentina. As set out in document A/CN.9/704/Add.1, his Government's proposal was to include the words "In so far as permitted under the law applicable to the arbitration", in order to ensure that the provision in draft paragraph 2 applied both to countries in which a waiver of the right of appeal was permitted and to those in which it was not.

64. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that he felt uneasy about the provision under discussion. It was misleading to state that "the parties shall carry out all awards without delay", since a motion to set aside or any resistance to enforcement could cause considerable delay. An observation to that effect should be made in the report.

65. Moreover, the report should make it clear that parties had a right to resist enforcement under article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and had a right to move to set aside or annul an award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration. The reference to a waiver of the right of appeal was therefore misleading, since parties had a right of appeal under the applicable law; the report should state that the right in question was limited to the grounds of the Model Law. In the text of the Rules, it would be preferable to retain, at most, the first two sentences of draft paragraph 2.

66. **Mr. Boulet** (Observer for Belgium) said that his Government was in favour of retaining the words in square brackets. Since the Committee was formulating a waiver clause, it must specify what was being waived. That was the purpose of the bracketed words, which also set out the limitations to the waiver.

67. **Mr. Moollan** (Mauritius) said that, in the absence of consensus, it was preferable to let the previous wording of article 34 stand. The words in brackets were based on the false assumption that the Model Law was applicable everywhere. Even where the Model Law had been enacted, derogations were often made from the model text. In the United Kingdom, for example, the provision under discussion would conflict with section 69 of the English Arbitration Act, under which setting aside was itself the remedy.

68. **Mr. Castello** (United States of America), with support from the representative of Mauritius, said that, if the first two sentences of draft paragraph 2 were to stand, then the wording contained in the draft should be retained rather than the wording of the 1976 Arbitration Rules, as an important amendment had been made to one of those sentences.

69. **The Chairperson** said that there was strong support for retaining the first two sentences of draft paragraph 2 and that there was no objection to the drafting changes in the third sentence proposed by the United States. The differences arose with respect to the bracketed phrase at the end of the paragraph. He was concerned that, unlike for article 16, the Committee could not assume that a judge would understand the meaning of the provision, since it dealt with procedural remedies for which the diverse terminology used in different countries might create confusion. He invited the Committee to consider whether there was any justification for specifying what types of recourse were reserved, given the difficulty of doing so. In the alternative, it might be best to highlight, as proposed by China, that only those remedies were excluded which the applicable law allowed to be excluded.

70. **Ms. Cordero Moss** (Norway) proposed the following wording, which in her view was sufficiently clear on what was being waived: "the parties waive their right to any form of appeal ... that may be waived under the applicable law and the waiver of which does not require a specific agreement".

*The meeting rose at 1.05 p.m.*